BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GEORGE A. CARTER, JR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,028,857
CLEAN HARBORS ENVIRONMENTAL SERVICES	)	
Respondent	)	
AND	)	
	)	
ACE-USA	)	
Insurance Carrier	)	

ORDER

Claimant appeals the May 23, 2008 Award of Administrative Law Judge Thomas Klein (ALJ). Claimant was awarded benefits after the ALJ found claimant had suffered a 5% permanent partial disability on a functional basis followed by a permanent partial general work disability of 56% after the ALJ averaged a wage loss of 54% with a task loss of 58.5%.

Claimant appeared by his attorney, Terry J. Torline of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Vincent A. Burnett of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on August 20, 2008.

ISSUES

1. What is the appropriate date of accident? Respondent argues for computation purposes that the July 23, 2005 date of accident found by the ALJ should be affirmed as it was claimant's last day of work with respondent. Claimant contended at oral argument to the Board the last day worked rule does not apply as claimant suffered a single trauma on January 20, 2004.

2. What was claimant's average weekly wage on the date of accident? The parties have agreed that claimant had a base wage of $1,049.13 through July 22, 2005 and a base wage of $1,052.87 effective July 23,

2005. Additionally, claimant's wage increased on July 24, 2006 to include fringe benefits in the amount of $151.89. However, the parties disagree on whether fringe benefits for meal allowance, room allowance, boot allowance and uniform and equipment allowance should be added to the wage effective July 24, 2006.

3. What is the nature and extent of claimant's injuries and disability? On this issue the parties are about as divergent as possible. Claimant argues that he is permanently and totally disabled while respondent argues claimant should be limited to his functional impairment due to claimant having lost his accommodated position with respondent after a sexual harassment allegation was brought to bear. The parties do not agree on claimant's functional impairment, whether respondent is entitled to a credit for a pre-existing functional impairment, what task loss and wage loss claimant may have suffered and claimant's entitlement to a work disability under K.S.A. 44-510e.

4. Is respondent entitled to a credit for Social Security retirement benefits paid to claimant, pursuant to K.S.A. 44-501(h)? On January 31, 2008, the parties filed with the Kansas Workers Compensation Division (Division) a "Stipulation Regarding Claimant's Social Security Benefits" (Stipulation). This Stipulation details the amount of Social Security benefits claimant has been receiving since September 2005.

FINDINGS OF FACT

Claimant worked as a truck driver for respondent, picking up hazardous waste from various customers. This job required that claimant handle drums weighing 400-450 pounds. On January 20, 2004, claimant had made a number of pickups with both drums and containers of waste. By the time claimant returned to respondent's facility in Wichita, claimant's back hurt so much that he could barely walk. The next morning, claimant went to respondent's facility and advised them he was going to his family doctor, Stephen F. Lemons, M.D. The medical reports indicate that claimant saw Dr. Lemons on January 20, 2004. Claimant was taken off work on that day and underwent an MRI on January 23, 2004. As a result of the injury, and after the MRI, claimant underwent a laminectomy and discectomy at L3-L4 on March 21, 2004, under the hands of Douglas Burton, M.D.

Dr. Burton eventually released claimant with a 50-pound weight restriction and claimant returned to work for respondent performing runs which only involved roll-offs. This required the driver to haul metal boxes or containers anywhere from 20 to 40 cubic yards in size. Roll-offs did not require that the driver physically handle the materials. Claimant continued working the roll-off job until July 2005 when an allegation of sexual harassment

was raised by workers at the Lone Mountain facility, where claimant delivered the roll-off containers. Thereafter, some of the workers at the Lone Mountain facility were uncomfortable with claimant continuing to deliver materials to that facility. Since that was the only facility roll-off loads were delivered to, claimant was precluded from working for respondent, as no other light duty jobs were available.

Claimant's medical history is significant in that he has had long-term back problems. Claimant underwent a laminectomy at L4-L5, a discectomy at L5-S1 and a fusion from L4 to S1 in 1983. This surgery was performed by board-certified neurological surgeon Paul S. Stein, M.D. and Duane Murphy, M.D. Dr. Stein examined claimant in 1990, taking x-rays which confirmed the previous fusion from 1983 was not solid as there was movement between L4 and L5. The fusion at L5-S1 was solid. On January 25, 2003, claimant underwent a laminectomy from L2 through L5 by Dr. Nazih Moufarrij.

Dr. Stein again examined claimant during a court-ordered IME on July 13, 2006. Claimant provided Dr. Stein with a history of the injury suffered on January 20, 2004 but failed to mention any accidents or series of accidents between January 2004 and the examination in 2006. Dr. Stein opined that claimant had a DRE Lumbosacral Category IV impairment, resulting in a 20% impairment to the body as a whole pursuant to the AMA *Guides*,[1] from the injuries and subsequent surgery in 1983. After the examination in 2006, Dr. Stein noted some slippage of the bone between L3 and L4, indicating additional instability. This slippage was related to the laminectomy and discectomy at L3-L4 done on March 21, 2004. Dr. Stein opined that claimant needed an additional surgery, which claimant underwent on September 18, 2006 with neurological surgeon Raymond Grundmeyer, M.D.

Claimant was again examined by Dr. Stein on June 27, 2007 on a referral from respondent's attorney. Claimant advised that his back pain had improved after the most recent surgery and his leg pain, numbness and tingling were gone. Claimant did have cramping in his leg muscles. Dr. Stein opined that claimant currently was in DRE Lumbosacral Category V which resulted in claimant having a 25% whole body impairment. Dr. Stein stated that this resulted in an increase of a 5% whole body impairment as the result of the January 20, 2004 accident. Dr. Stein returned claimant to work with the recommendation that claimant lift no more than 30 pounds with any single lift up to twice per day, 20 pounds occasionally and 10 pounds more often, but not repetitively. Claimant was restricted from lifting from below knuckle height or above chest height and not allowed to repetitively bend or twist from the low back. He was advised to sit, stand and walk as needed. Dr. Stein was provided the task list prepared by vocational expert Dan Zumalt. Of the 16 nonduplicative tasks on the list, claimant was unable to perform 5 for a 31% task loss. Dr. Stein was also provided a task list prepared by claimant and his attorney. Of the

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

7 nonduplicative tasks on the list claimant was unable to perform any for a 100% task loss. The Board finds the task list of Dan Zumalt to be appropriate here.

Claimant was referred to board-certified physical medicine specialist George G. Fluter, M.D. by his attorney for an examination on July 31, 2007. Dr. Fluter agreed with Dr. Stein's assessment that claimant suffered from a DRE lumbosacral spine impairment Category IV which pre-existed the most recent injury. This resulted in claimant having a pre-existing 20% whole body impairment. As the result of the January 2004 injury, claimant now had a DRE Lumbosacral Category V which carries a 25% whole body impairment. Thus claimant had a 5% whole body impairment as the result of the more recent injury. Dr. Fluter determined that claimant should be limited to the sedentary level of physical demand employment with limitations to exposure of the spine to vibration. He determined that claimant could not drive a truck unless he drove only for short periods. In reviewing the 7 nonduplicative tasks generated by claimant Dr. Fluter felt claimant was unable to perform 6 for a task loss of 86%. He felt, based on claimant's overall condition, that claimant was permanently and totally disabled.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident

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[2] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 44-501(a).

> occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

Claimant alleges a specific injury on January 20, 2004 although he originally argued a series through July 23, 2005, his last day worked for respondent. Claimant was returned to work at a comparable wage performing light work in an accommodated position. The light duty job did not require that claimant lift anything. The truck he drove was for roll-offs. There is no indication in this record that claimant's condition was in any way worsened by this obviously easier job. The Board finds that claimant suffered a single traumatic injury on January 20, 2004, and this Award will be based upon that finding.

> The term "wage" shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment.[6]

The Award contained a conditional stipulation finding that claimant had a base wage on July 23, 2005 of $1,052.87. The record also contains a stipulation that claimant's base wage before July 23, 2005 was $1,049.13. Claimant also had fringe benefits for both dates of $151.89 which were discontinued effective July 24, 2006. These amounts were not disputed by the parties. With a date of accident of January 20, 2004, claimant's base wage should be $1,049.13, with stipulated fringe benefits of $151.89. This computes to a wage of $1,201.02 without any additional fringe benefits.

What remains in dispute is claimant's assertion that meal allowances, boot allowances, room allowances and uniform and equipment allowances be added to the wage as additional compensation. K.S.A. 2003 Supp. 44-511(a)(3) provides that the "term 'wage' shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment." This issue was addressed by the Kansas Court of Appeals in *Ridgway v. Board of Ford County Comm'rs*, 12 Kan. App. 2d 441, 748 P.2d 891 (1987), *rev. denied* 242 Kan. 903 (1988). In *Ridgway*, the Court was asked to consider whether the $225.00 per month the claimant received for using his own car and the $35.00 per month the claimant received for cleaning his uniform were to be considered as part of that claimant's wages

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[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[6] K.S.A. 2003 Supp. 44-511(a)(3).

under K.S.A. 44-511. The question raised was whether the funds paid to the claimant represented an economic gain to that claimant. The Court in *Ridgway* stated:

> Before any part of such allowances or reimbursements can be considered as a part of the employee's 'wages' there should be some showing that the payments are more than sufficient to reimburse the employee for the work-related expense so that in effect the excess can be considered as extra compensation to the workman for his services performed . . . . (*Ridgway*, 12 Kan. App. 2d at 443, 444; *quoting Moorehead v. Industrial Commission*, 17 Ariz. App. 96, 99, 495 P.2d 866 (1972).)

The Court in *Ridgway* determined that the $225.00 car allowance represented a financial gain to the claimant as it was not simply reimbursement for out-of-pocket work-related expenses. The claimant stated that he had bought an "old junker" and he only paid $51.00 in liability insurance every six months. He simply pocketed the $225.00. He considered it as extra wages. (*Id.* at 444.) The *Ridgway* Court denied inclusion of the uniform cleaning allowance of $35.00 as the record was not clear that the claimant actually spent the $35.00 on anything other than cleaning his uniform. The economic gain was not proven in that instance.

Here, claimant alleges economic gain from a boot allowance and uniform and related gear allowances. Claimant testified that he actually did buy the boots every year and obviously used the uniforms and gear. As was found in *Ridgway*, there is no showing here that claimant benefitted economically from these items. The rules set forth in *Ridgway* would not allow the inclusion of either the boot allowance or the uniform and gear allowances as a part of claimant's average weekly wage. The situation with the meal and room allowances is different. Claimant testified that he usually slept in his truck and rarely used the room allowance of $10.00 per day. (Evans Depo. at 7.) Additionally, claimant did not always use the meal allowance as he sometimes only ate on the road 2-3 days per week. As claimant was allowed to simply pocket the money not spent, there is a clear economic benefit associated with both the meal and room allowances. Thus, pursuant to the policies set forth in *Ridgway*, both would be included in claimant's average weekly wage. With a $30.00 per day food allowance and a $10.00 per day room allowance, claimant would be entitled to an additional $200.00 in fringe benefits added to his average weekly wage. This computes to an average weekly wage of $1,401.02.

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.[7]

Claimant argues that he is permanently and totally disabled. Dr. Fluter, claimant's medical expert, agrees with that claim, recommending that claimant not drive. However, claimant has proven his ability to drive a truck during the many months he drove for

[7] K.S.A. 44-510c(a)(2).

respondent after his January 20, 2004 accident. Admittedly, that job was a light duty job, but claimant, nevertheless, displayed the ability to do the job. Additionally, both Dr. Stein and Dan Zumalt found claimant to have the ability to work in the open labor market. The Board finds that claimant has failed to prove that he is permanently and totally disabled as a result of the accident on January 20, 2004.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[8]

Claimant acknowledged at regular hearing that he was not looking for work and could not go to work "until this thing is settled." (R.H. Trans. at 31.)

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[9] and *Copeland.*[10] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[11]

Claimant admitted that he is not looking for work, pending the conclusion of his workers compensation claim. In fact, claimant testified at regular hearing that he could not go to work until his workers compensation case was settled. (R.H. Trans. at 31.) This does not satisfy the good faith requirement of *Copeland*. Therefore, a wage will be imputed.

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[8] K.S.A. 44-510e.

[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[11] *Id.* at 320.

Mr. Zumalt opined that claimant had the ability to earn $541.60 per week, which includes fringe benefits. The Board agrees that this is what claimant retains the ability to earn. This, when compared to the above calculated wage of $1,401.02, results in a loss in wage earning ability of 61%. Dr. Stein found claimant suffered a 31% task loss while Dr. Fluter found claimant suffered an 86% task loss. The Board finds no justification in giving greater weight to either opinion and will average the two. This calculates to a task loss of 58.5%. When averaged with the above wage loss, this results in a permanent partial work disability of 59.75%.

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[12]

The ALJ found claimant had a 20% pre-existing functional impairment but made no adjustment in the final disability award as is required by K.S.A. 44-501(c). The Board also finds that claimant has a 20% pre-existing functional whole body impairment and will adjust the final disability to award claimant a final permanent partial disability award of 39.75%.

> If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.[13]

On January 31, 2008, the parties filed with the Division a Stipulation detailing the amount of Social Security retirement benefits paid claimant, beginning in September 2005 and continuing throughout the duration of this Award. The ALJ, in calculating the weekly offset of benefits, simply divided the stipulated monthly Social Security amount by four weeks and calculated the weekly offset accordingly. This ignores the fact that there is only one month in the year with only 28 days. And, even that is inaccurate in a leap year. The Board finds that respondent is entitled to an offset pursuant to K.S.A. 44-501(h). However, the calculated amounts determined by the ALJ will be corrected by the Board as follows: for the year 2005, claimant was paid $1,222.00 per month which calculates to a weekly benefit

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[12] K.S.A. 44-501(c).

[13] K.S.A. 44-501(h).

of $282.00. For the year 2006, claimant's monthly benefit level rose to $1,278.54 which calculates to a weekly benefit of $295.05. For the year 2007, claimant's monthly benefit level rose to $1,321.00 which calculates to a weekly benefit of $304.85. For the year 2008, claimant's monthly benefit level rose to $1,352.30 which calculates to a weekly benefit of $312.07.

With a date of accident of January 20, 2004, claimant's maximum weekly disability benefit will be $440.00. This maximum weekly payment will not vary with the inclusion of the fringe benefits effective July 24, 2006. It will however be reduced due to the Social Security offsets designated above.

Pursuant to the stipulation of the parties at the regular hearing, claimant was paid and is entitled to 75.43 weeks TTD. This will be followed by a 5% permanent partial functional disability while claimant was working and earning at least 90% of his pre-injury wage, followed by a 39.75% permanent partial work disability.

As noted at the regular hearing, claimant was paid 30 weeks of TTD benefits from January 21, 2004 until August 18, 2004. This TTD was paid before claimant began receiving Social Security benefits. Therefore, claimant would be due 30 weeks of TTD at the weekly rate of $440.00 totaling $13,200.00. Thereafter, claimant is awarded a 5% permanent partial disability on a functional basis for the injuries suffered on January 20, 2004. This represents 17.73 weeks of benefits, and as the entire amount would be due and payable before the September 2005 start of claimant's Social Security benefits, no offset would be appropriate. This calculates to $7,801.20.

Claimant's last day worked for respondent was July 23, 2005, and the beginning of his entitlement to a work disability is July 24, 2005. As claimant did not begin receiving Social Security benefits until September 2005, no offset would be appropriate through August 31, 2005. This represents a period of 5.57 weeks at $440.00 per week, totaling $2,450.80. Claimant was paid TTD from July 13, 2006 through May 26, 2007, a period of 45.43 weeks. For the 24.57 weeks from July 13, 2006 through December 31, 2006, claimant is entitled to benefits at the reduced weekly rate of $144.95, totaling $3,561.42. For the 20.86 weeks from January 1, 2007 through May 26, 2007, claimant is entitled to benefits at the reduced weekly rate of $135.15, totaling $2,819.23. Thereafter, claimant is entitled to an additional 117.64 weeks of permanent partial disability benefits for a 39.75% permanent partial general work disability.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant 75.43 weeks TTD, followed by a 5% permanent partial functional disability, followed by a 39.75% permanent partial general work

disability for injuries suffered on January 20, 2004, and based on an average weekly wage of $1,049.13 until July 24, 2006, when it increases to $1,401.02. Respondent is granted an offset for the payment of Social Security retirement benefits to claimant as set out above.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[14] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Thomas Klein dated May 23, 2008, should be, and is hereby, modified to find that claimant suffered an accidental injury which arose out of and in the course of his employment on January 20, 2004. Claimant had an average weekly wage of $1,049.13 through July 23, 2006 and an average weekly wage including fringe benefits of $1,401.02 beginning July 24, 2006. Claimant suffered a 5% permanent partial functional disability followed by a 39.75% permanent partial general work disability, after the deduction of a 20% whole body pre-existing functional impairment. Respondent is entitled to an offset for Social Security retirement benefits as stipulated by the parties.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, and against the respondent, Clean Harbors Environmental Services, and its insurance carrier, Ace-USA, for an accidental injury which occurred on January 20, 2004 and based upon an average weekly wage of $1,049.13 through July 23, 2006 and $1,401.02 effective July 24, 2006.

Claimant's award will be paid as follows: for the period from January 21, 2004 until August 18, 2004 claimant is awarded 30 weeks TTD at the rate of $440.00 per week, totaling $13,200.00; for the period from August 18, 2004 through December 19, 2004 claimant is awarded 17.73 weeks permanent partial disability compensation at the rate of $440.00 per week, totaling $7,801.20, for a 5% permanent partial disability on a functional basis; for the period from December 20, 2004 through July 23, 2005, claimant would not be entitled to additional permanent partial disability compensation, having been returned to work at a comparable wage; effective July 24, 2005 claimant became entitled to a 39.75% permanent partial work disability, having been laid off from respondent due to respondent's inability to continue accommodating claimant's restrictions; for the period from July 24, 2005 through August 31, 2005 claimant is awarded 5.57 weeks permanent partial disability compensation at the rate of $440.00 per week, totaling $2,450.80; for the period from September 1, 2005 through December 31, 2005 claimant is awarded 17.43 weeks

[14] K.S.A. 2007 Supp. 44-555c(k).

permanent partial disability compensation at the reduced rate of $158.00 per week, totaling $2,753.94; for the period from January 1, 2006 through July 12, 2006, claimant is awarded 27.57 weeks permanent partial disability compensation at the reduced rate of $144.95 per week, totaling $3,996.27; for the period from July 13, 2006 through December 31, 2006 claimant is awarded 24.57 weeks TTD at the reduced rate of $144.95 per week, totaling $3,561.42; for the period from January 1, 2007 through May 26, 2007 claimant is awarded 20.86 weeks TTD at the reduced rate of $135.15 per week, totaling $2,819.23; for the period from May 27, 2007 through December 31, 2007, claimant is awarded 31.29 weeks permanent partial disability compensation at the reduced rate of $135.15 per week, totaling $4,228.84; for the period from January 1, 2008 through October 16, 2008 claimant is awarded 41.35 weeks permanent partial disability compensation at the reduced rate of $127.93 per week, totaling $5,289.91, for a total award of $46,101.61.

As of October 16, 2008, the entire amount of compensation would be due and owing and ordered paid in one lump sum, minus amounts previously paid.

In all other regards, the Award of the ALJ is affirmed so long as it does not contravene the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of October, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Terry J. Torline, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge